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Liew Hon Kong v Bank Pertanian Malaysia Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)(NCC)-64–07 OF 2019
SURAYA OTHMAN, HAS ZANAH MEHAT AND NANTHA BALAN JJCA
25 MAY 2021

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Bankruptcy — Creditor's petition — Setting aside — Appellant's application to set aside creditor's petition was dismissed by senior assistant registrar and High Court judge — Whether the Insolvency Act 1967 which came into force on 6 October 2017 was applicable and creditor's petition which was filed on 14 May 2018 was therefore a nullity because of non-compliance with s 5(3) of the Insolvency Act 196 — Whether by reason of s 60 of the Bankruptcy (Amendment) Act 2017, creditor's petition which was filed on 14 May 2018, was valid, albeit that it was not in compliance with s 5(3)(b) of the Insolvency Act 1967 — Whether judgment creditor's rights under Bankruptcy Act 1967 and Bankruptcy Rules 1969 had been completely abrogated under Insolvency Act 1967 — Whether bankruptcy proceedings commenced upon issuance of bankruptcy notice — Bankruptcy (Amendment) Act 2017 s 60 — Bankruptcy Act 1967 s 3 — Bankruptcy Rules 1969 r 91 — Insolvency Act 1967 s 5(3) — Insolvency Rules 2017 r 287(1)

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The respondent had granted a loan facility ('the facility') to a company known as Maple Amalgamated Sdn Bhd (in liquidation) ('MASB') for the purpose of funding part of the purchase price of a land. Pursuant to a guarantee and indemnity, the appellant had guaranteed the repayment of any outstanding amount due and owing by MASB under the facility. In the present case, it was not disputed that the appellant was a non-social guarantor. Due to the default by MASB in repayment of the facility, the respondent had filed legal action against MASB as well as the appellant. The court found in favour of the respondent and the respondent proceeded with the bankruptcy proceedings. It ought to be noted that the bankruptcy notice ('the BN') was issued on 20 September 2017 whereby at the material time, the applicable statute was the Bankruptcy Act 1967 ('the BA'). However, when the BN was served, the act of bankruptcy occurred and the creditor's petition ('the CP') was issued, the new Insolvency Act 1967 ('the IA') had already come into force. The appellant had applied to set aside the CP, but the application was dismissed by the senior assistant registrar as well as the High Court judge, hence, the present appeal. The issues for determination in the present appeal were: (a) whether the IA which came into force on 6 October 2017 was applicable and the CP which was filed on 14 May 2018 was therefore a nullity because of non-compliance

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with s 5(3) of the IA ie for failure to obtain leave of insolvency court before filing of the CP; and (b) whether by reason of s 60 of the Bankruptcy (Amendment) Act 2017, the CP which was filed on 14 May 2018, was valid, albeit that it was not in compliance with s 5(3)(b) of the IA.

Held, dismissing the appeal with costs of RM10,000 subject to allocator:

(1) The court accepted that bankruptcy proceedings was a two staged process, but the court disagreed with the argument that the BN was issued 'administratively' and therefore merely 'kickstarts' the process. There was no provision in the BA or the IA which stated that bankruptcy proceedings were deemed to have commenced only upon the filing of the CP. The moment an application was made for the issuance of the BN, the jurisdiction of the bankruptcy court was invoked, and the jurisdiction continued until the very end, ie, beyond the adjudicating order and receiving order. In relation to the two staged process, ie, BN followed by CP was concerned, this merely meant that there were two steps to be taken. But they were nevertheless steps within a single legal proceeding as in the present case whereby the BN and the CP shared the same bankruptcy number, ie, BC4238 (see paras 59, 61, 67–68 & 71).

(2) The respondent as a judgment creditor had a vested or accrued right to apply under the BA and the Bankruptcy Rules 1969 for the issuance of the BN, and thereafter the CP as well. Those rights were not procedural rights but were substantive rights to commence bankruptcy and which could not be taken away, except by clear statutory words in the amending statute. Indeed, the respondent's rights with regard to the BN and the CP were preserved as per s 60 of the Bankruptcy (Amendment) Act 2017, and r 287(1) of the Insolvency Rules 2017 (see para 77).

(3) The intention of a saving provision was to narrow the effect of the enactment in which it was found to preserve some existing rule or right, as the case may be, from its operation. Section 60 of the Bankruptcy (Amendment) Act 2017 which was a saving provision, was enacted to preserve vested rights under the BA and the Bankruptcy Rules 1969 and to preclude the application of the IA and the Insolvency Rules 2017. Hence, the bankruptcy proceedings which were initiated by the issuance of the BN (pursuant to s 3 of the BA and the Bankruptcy Rules 1969) was to be continued and concluded pursuant to the BA. In the result, the court was not convinced that the judge had misdirected himself in law. In addition, as the legislation which governed the CP in this case was the BA and the Bankruptcy Rules 1969, the issue of obtaining leave of the insolvency court under s 5(3) of the IA did not arise (see paras 81 & 86–87).

[Bahasa Malaysia summary

Responden telah memberikan kemudahan pinjaman ('kemudahan tersebut') kepada sebuah syarikat yang dikenali sebagai Maple Amalgamated Sdn Bhd (dalam likuidasi) ('MASB') bagi tujuan membiayai sebahagian daripada harga pembelian sebidang tanah. Menurut jaminan dan indemniti, perayu telah menjamin pembayaran balik apa-apa jumlah tertunggak yang perlu dibayar dan terhutang oleh MASB di bawah kemudahan tersebut. Dalam kes ini, tidak dipertikaikan bahawa perayu adalah seorang penjamin bukan sosial. Disebabkan keingkaran oleh MASB dalam pembayaran balik kemudahan tersebut, responden telah memfailkan tindakan undang-undang terhadap MASB serta perayu. Mahkamah membuat keputusan yang memihak kepada responden dan responden telah meneruskan dengan prosiding kebankrapan. Perlu diingat bahawa notis kebankrapan ('NK') telah dikeluarkan pada 20 September 2017 di mana pada masa yang material, undang-undang yang terpakai ialah Akta Kebankrapan 1967 ('AK'). Walau bagaimanapun, apabila BN diserahkan, tindakan kebankrapan berlaku dan petisyen pemiutang ('PP') dikeluarkan, Akta Insolvensi 1967 ('AI') yang baru telah pun berkuat kuasa. Perayu telah memohon untuk mengenepikan PP, tetapi permohonan tersebut telah ditolak oleh penolong kanan pendaftar serta hakim Mahkamah Tinggi, justeru, rayuan ini. Isu-isu untuk penentuan dalam rayuan ini adalah: (a) sama ada AI yang berkuat kuasa pada 6 Oktober 2017 adalah terpakai dan PP yang difailkan pada 14 Mei 2018 adalah terbatal kerana ketidakpatuhan s 5(3) AI iaitu kerana gagal mendapatkan kebenaran mahkamah insolvensi sebelum memfailkan PP; dan (b) sama ada disebabkan oleh s 60 Akta Kebankrapan (Pindaan) 2017, PP yang difailkan pada 14 Mei 2018, adalah sah, walaupun ia tidak mematuhi s 5(3)(b) AI.

Diputuskan, menolak rayuan dengan kos RM10,000 tertakluk kepada alokator:

(1) Mahkamah bersetuju bahawa prosiding kebankrapan adalah proses dua peringkat, tetapi mahkamah tidak bersetuju dengan hujah bahawa NK dikeluarkan secara 'pentadbiran' dan oleh itu hanya untuk 'memulakan' proses tersebut. Tiada peruntukan dalam AK atau AI yang menyatakan bahawa prosiding kebankrapan dianggap telah dimulakan hanya selepas pemfailan PP. Sebaik sahaja permohonan dibuat untuk mengeluarkan NK, bidang kuasa mahkamah kebankrapan telah digunakan, dan bidang kuasa diteruskan sehingga akhir, iaitu, selepas perintah penghakiman dan perintah penerimaan. Berhubung dengan dua proses berperingkat iaitu NK yang diikuti dengan PP, ini hanya bermakna terdapat dua langkah yang perlu diambil. Namun kedua-duanya berada dalam satu prosiding undang-undang yang sama seperti dalam kes ini di mana NK dan PP berkongsi nombor kebankrapan yang sama, iaitu, BC4238 (lihat perenggan 59, 61, 67–68 & 71).

(2) Responden sebagai pemiutang penghakiman mempunyai hak yang diberikan atau hak terakru untuk memohon di bawah AK dan Kaedah-Kaedah Kebankrapan 1969 untuk pengeluaran NK, dan juga selepas itu PP. Hak-hak tersebut bukanlah hak prosedural tetapi merupakan hak substantif untuk memulakan kebankrapan dan ianya tidak boleh diketepikan, kecuali dengan perkataan undang-undang yang jelas dalam akta pindaan. Sesungguhnya, hak-hak responden berkenaan dengan NK dan PP terpelihara di bawah s 60 Akta Kebankrapan (Pindaan) 2017, dan k 287(1) Kaedah-Kaedah Insolvensi 2017 (lihat perenggan 77).

(3) Tujuan peruntukan penyelamat adalah untuk mengurangkan kesan enakmen di mana ia didapati bagi mengekalkan beberapa peraturan atau hak sedia ada, mengikut mana-mana yang berkenaan, daripada pemakaiannya. Seksyen 60 Akta Kebankrapan (Pindaan) 2017 yang merupakan peruntukan penyelamat, telah digubal untuk mengekalkan hak yang diberikan di bawah AK dan Kaedah-Kaedah Kebankrapan 1969 dan untuk menghalang pemakaian AI dan Kaedah-Kaedah Insolvensi 2017. Oleh itu, prosiding kebankrapan yang telah dimulakan dengan pengeluaran NK (menurut s 3 AK dan Kaedah-Kaedah Kebankrapan 1969) perlu diteruskan dan dimuktamadkan menurut Akta Kebankrapan 1967. Akibatnya, mahkamah tidak bersetuju bahawa hakim telah tersalah arah dalam undang-undang. Di samping itu, memandangkan undang-undang yang mengawal PP dalam kes ini ialah AK dan Kaedah-Kaedah Kebankrapan 1969, isu mendapatkan kebenaran mahkamah insolvensi di bawah s 5(3) AI tidak timbul (lihat perenggan 81 & 86–87).]

Cases referred to

Affin Bank Bhd (previously known as Perwira Affin Bank Bhd) v Abu Bakar bin Ismail [2018] 2 MLJ 88, CA (refd)

Affin Bank Bhd (formerly known as Perwira Affin Bank Bhd) v Abu Bakar bin Ismail [2020] 2 MLJ 689, FC (refd)

Dato' Sri Teong Teck Leng v Jupiter Securities Sdn Bhd [2004] 1 MLJ 1; [2003] 5 AMR 672; [2003] 4 CLJ 34, CA (refd)

Dixie v Royal Columbian Hospital [1941] 2 DLR 138 (refd)

Herry v Dudley Metropolitan Council; Herry v Dudley Metropolitan Council and another [2017] ICR 610 (distd)

Hong Leong Bank Bhd v Khairulnizam bin Jamaludin [2016] 4 MLJ 302, FC (refd)

Rees, In re [1923] NZLR 779, SC (distd)

Lee Chow Meng v PP [1978] 2 MLJ 36; [1978] 1 LNS 88, FC (refd)

Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1, FC (refd)

View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22, FC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3 , 3(1)(i), 3(2)
Bankruptcy Rules 1969 rr 4, 9, 91, 91(1), 96, 97, 110, Forms 4, 5
Bankruptcy Act 1908 [UK] ss 31, 55, 80
Insolvency Act 1967 ss 5(3), (3)(b), 5(4), 123
Insolvency Act 1986 [UK] ss 267, 268
Insolvency Rules 2017 rr 89, 287(1)

Appeal from: Bankruptcy Case No WA-29NCC-4238–09 of 2017

Wong Rhen Yen (Emily Wong Li Yan and Jasneeta Kaur Bhullar with him) (Ahmad Fadzly Maha and Sim) for the appellant.
B Vijay Raj (Ratha Govindasamy and Ng Kar Man with him) (Skrine) for the respondent.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] The appeal before us arises out of bankruptcy proceedings which were taken against Mr Liew Hon Kong (the judgment debtor — 'the JD'). The JD had applied to the senior assistant registrar ('the SAR') of the insolvency court to set aside the creditor's petition ('the CP') which had been filed by the respondent (judgment creditor — 'the JC'). The SAR dismissed the JD's application. The JD filed a notice of appeal to the judge in chambers dated 29 March 2019 (encl 73) against the SAR's decision. On 22 July 2019, the learned judge of the High Court ('the judge') dismissed the JD's appeal. This is the JD's appeal against the judge's said decision dismissing the appeal and refusing to set aside the CP. On 25 May 2021 we dismissed the JD's appeal. This judgment explains why we dismissed the JD's appeal.

BANKRUPTCY NOTICE

[2] In this case, the bankruptcy notice ('the BN') was issued against the JD on 20 September 2017. At that time, bankruptcy proceedings were governed by the Bankruptcy Act 1967 ('the BA 1967') and the Bankruptcy Rules 1969. Under the BA 1967, a CP could be filed against a non-social guarantor without leave of the insolvency court. It is not in dispute that the JD is a non-social guarantor.

INSOLVENCY ACT 1967

[3] On 21 November 2016, the new Bankruptcy (Amendment) Bill 2016 was passed as the Bankruptcy (Amendment) Act 2017 and received Royal

Assent on 10 May 2017. By way of the *gazette* notification PU (B) 466/2017 dated 3 October 2017, the Bankruptcy (Amendment) Act 2017 came into force on 6 October 2017. Pursuant to the Bankruptcy (Amendment) Act 2017, the short title to the BA 1967 was changed to the Insolvency Act 1967 ('IA 1967'). The Bankruptcy (Amendment) Act 2017 was mainly to strengthen the provisions relating to non-social guarantors and social guarantors and to raise the minimum debt threshold for the filing of a bankruptcy petition. Notwithstanding the changes brought about through such amendments, s 60 of the Bankruptcy (Amendment) Act 2017 preserved, among others, the proceedings, actions, or other matters required to be done under the BA 1967 which were still pending immediately before the IA 1967 came into operation, and those proceedings were to be continued under the BA 1967, as if the BA 1967 had not been amended. Further, in carrying into effect the objects of the IA 1967, the Insolvency Rules 2017 (PU(A)305/2017) were enacted pursuant to s 123 of the IA 1967 and came into force on 6 October 2017.

[4] These amendments brought about important changes to the bankruptcy regime. Under the BA 1967, a judgment creditor could commence bankruptcy action against a 'social guarantor', only if he satisfied the court that he had exhausted all avenues to recover the debts owed to him by the principal debtor. However, the IA 1967 absolutely prohibited bankruptcy proceedings against a social guarantor.

[5] The BA 1967 defined 'social guarantor' as a person who provided, not for the purpose of making profit, the following guarantees:

(a) a guarantee for a loan, scholarship or grant for educational or research purposes;

(b) a guarantee for a hire-purchase transaction of a vehicle for personal or non-business use; and

(c) a guarantee for a housing loan transaction solely for personal dwelling.

[6] Under s 5(3) of the IA 1967, the protection for non-social guarantors is that the judgment creditor must obtain leave of the insolvency court before commencing any bankruptcy action against the said non-social guarantor. To obtain leave, the creditor must satisfy the court that he had exhausted all modes of execution and enforcement (including seizure and sale, judgment debtor summons, garnishment, bankruptcy or winding up proceedings) to recover the debts owed by the principal debtor.

SECTION 5 (3) OF THE IA 1967

[7] The only question here is whether leave of the insolvency court was required for the filing of the CP in accordance with s 5(3) of the IA 1967 which reads as follows:

> (3) A petitioning creditor shall not be entitled to commence any bankruptcy action —
>
> (a) against a social guarantor; and
>
> (b) against a guarantor *other than a social guarantor* unless the petitioning creditor has *obtained leave from the court*.
>
> (4) Before granting leave referred to in paragraph (3)(b), *the court shall satisfy itself that the petitioning creditor has exhausted all modes of execution and enforcement to recover debts owed to him by the debtor*.
>
> (5) Where the petition is presented against a guarantor pursuant to subsection (4), a petitioning creditor shall state in his petition the particulars of his borrower.
>
> (6) For the purposes of subsection (4), modes of execution and enforcement include seizure and sale, judgment debtor summon, garnishment and bankruptcy or winding up proceedings against the borrower.
>
> (7) If the petitioning creditor fails to comply with the requirements of this section, the court shall dismiss the petition.

[8] The dispute here is whether with effect from 6 October 2017, the applicable statute vis a vis the JD is the IA 1967?

SAVING — SECTION 60 OF THE BANKRUPTCY (AMENDMENT) ACT 2017

[9] It is important to mention at the outset that there is a 'saving' provision via s 60 of the Bankruptcy (Amendment) Act 2017 which reads as follows:

> 60 Saving
>
> (1) This Act shall not apply to a debtor or a bankrupt against whom a receiving order or adjudication has been made before the coming into operation of this Act.
>
> (2) *Any proceedings, actions or other matters required to be done under the principal Act which are still pending immediately before the coming into operation of this Act shall be continued or concluded under the principal Act as if the principal Act had not been amended by this Act*.
>
> (3) Notwithstanding subsection (1), subsection 33B(2A) shall apply to a person who has been adjudged bankrupt before the coming into operation of this Act.

RULE 287(1) OF THE INSOLVENCY RULES 2017

[10] On this score it is also apposite to mention that there is a saving provision within the Insolvency Rules 2017, namely r 287(1) which provides:

> (1) All proceedings, actions or matters under the revoked Rules which are still pending immediately before the coming into operation of these Rules shall be continued or concluded under the revoked Rules.

THE ISSUE

[11] In this case, the BN was served on the JD after the IA 1967 came into force. Further, the 'act of bankruptcy' occurred after the IA 1967 came into force. Lastly, the CP was also filed after the IA 1967 came into force.

[12] The issue is whether in the circumstances, the IA 1967 was applicable and the CP was a nullity, as the JC had not satisfied the insolvency court that they had exhausted all modes of execution against the principal debtor.

CRITICAL DATES

[13] For purposes of this appeal the critical dates are the date of filing of the BN and the CP. In this regard, the *BN was filed on 20 September 2017* and registered as Kuala Lumpur High Court Bankruptcy Case No WA-29NCC-4238–09 of 2017 ('BC4238').

[14] On 12 December 2017, the JC's application for an extension of time to serve the BN on the JD was allowed. The BN was extended until 20 March 2018.

[15] The BN was served by way of personal service on 5 January 2018. The act of bankruptcy occurred on 18 January 2018. The CP was filed on 14 May 2018 and duly registered under BC4238.

THE BACKGROUND

[16] We may now allude to the background which gives the context to the problem. Pursuant to a letter of offer dated 18 June 2008, the JC had granted an *Al Bai Bithaman Ajil* financing facility to a company known as Maple Amalgamated Sdn Bhd (in liquidation) ('MASB') for the purpose of funding part of the purchase price of the land held under HS(D) 20109, Lot 11445 in the Mukim of Durian Sebatang, District of Hilir Perak, State of Perak Darul Ridzuan ('the facility'). Pursuant to a guarantee and indemnity dated 24 June 2008, the JD had guaranteed the repayment of any outstanding amount due

and owing by MASB under the facility.

[17] Following MASB's default in the repayment of the facility, the JC terminated the same and filed an action against MASB and the JD in Kuala Lumpur High Court Civil Suit No WA-22M-39–03 of 2017 to recover the sums due and owing to the JC, pursuant to which the JC obtained a judgment in its favour on 17 July 2017 for the sum of RM63,087,055.18 as at 12 January 2017 ('the judgment').

[18] On 20 September 2017, the JC applied for the BN to be issued against the JD upon his failure to settle the sum payable under the judgment.

[19] On 20 September 2017, the court had issued the BN against the JD which sets out, inter alia, that the JD must pay to the JC the amount of RM63,616,284.43 being the sum calculated as at 20 September 2017 together with *ta'widh* and costs within seven days upon the JD being served with the BN. The JD failed to pay the said sum within the time period or at all.

[20] On 14 May 2018, the JC filed the CP against the JD for the sum of RM63,616,284.43.

[21] During the bankruptcy proceedings, the JD had filed various interlocutory applications (to, inter alia, set aside the BN and to stay the bankruptcy action) in his attempt at resisting the bankruptcy proceedings against him. The JD's applications were dismissed.

[22] On 7 December 2018, the JD filed an application to set aside the CP ('encl 57'). On 21 March 2019, encl 57 was dismissed with costs by the SAR.

[23] On 29 March 2019, the JD appealed to the judge in chambers ('encl 73') against the SAR's decision on 21 March 2019.

[24] On 22 July 2019, encl 73 was dismissed with costs by the judge. On 24 July 2019, the JD filed this appeal against the judge's decision on 22 July 2019 ('this appeal'). At the same time, on 22 July 2019, the JD filed an application to stay the bankruptcy proceedings pending disposal of this appeal ('encl 84').

[25] On 19 November 2019, encl 84 was dismissed with costs by the SAR. On the same day, the SAR proceeded to hear the CP and an adjudicating order and receiving order dated 19 November 2019 ('AORO') was entered against the JD. However, on 13 January 2020, the learned judicial commissioner of the High Court allowed a stay of proceedings pending the outcome of this appeal.

[26] As can be seen, the BN was issued on 20 September 2017. At that time the applicable statute was the BA 1967. However, (a) when the BN was *served*, and (b) when the *act of bankruptcy occurred*, and (c) when the *CP was issued*, the IA 1967 had already come into force.

[27] The question before us is whether the IA 1967 (which came into force on 6 October 2017) applied and the CP is therefore a nullity because of non-compliance with s 5(3) of the IA 1967? The parties were divided on the question of whether bankruptcy proceedings commenced upon issuance of the BN or whether it commenced upon the filing of the CP. The related issue is whether by reason of s 60 of the Bankruptcy (Amendment) Act 2017, the CP which was filed on 14 May 2018, is valid, albeit that it was not in compliance with s 5(3)(b) of the IA 1967.

THE JUDGE

[28] Essentially, the point that was taken before the SAR and the judge was that the CP is a nullity because of noncompliance with s 5(3) of the IA 1967. The judge dismissed the JD's attempt to set aside the CP. His grounds for dismissing the JD's appeal are as follows:

> Decision on the Appeal
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> 14. Taking note of the submissions of the parties, in giving the decision of the present appeal to judge in chambers, the issues to be considered are as follows:
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> (a) whether the BA should be applied or the IA;
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> (b) is there a need to obtain leave first before the JC can proceed against the JD for bankruptcy;
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> (c) whether the total debt sum claimed by the JC is imprecise, excessive and incorrect;
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> (d) whether the CP is premature as the validity of the BN is still being argued before the judge in chambers;
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> (e) whether the person who signed the CP is not empowered to do so;
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> (f) whether the JD will be prejudiced if JC is allowed to proceed with the CP.
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> A. Whether the BA should be applied or the IA
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> 15. This issue arose because the JD submitted the JC failed to comply with the provisions of s 5(3)(b), 5(4), 5(5) and 5(6) of the IA. The provisions state as follows:
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> S 5(3)(6)
>
> A petitioning creditor shall not be entitled to commence any bankruptcy action against a guarantor other than a social guarantor unless the petitioning creditor has obtained leave from the court.

S 5(4)

Before granting leave referred to in para (3)(b), the court shall satisfy itself that the petitioning creditor has exhausted all modes of execution and enforcement to recover debts owed to him by the debtor.

S 5(5)

Where the petition is presented against a guarantor pursuant to subsection (4), a petitioning creditor shall state in his petition the particulars of his borrower.

S 5(6)

For the purposes of subsection (4), modes of execution and enforcement include seizure and sale, judgment debtor summon, garnishment and bankruptcy or winding up proceedings against the borrower.

16. With respect to the JD, none of the provisions above would apply because the BN in this case commencing the bankruptcy action was filed on 20 September 2017, before the IA came into force on 16 October 2017.

17. In this regard s 60(2) of the Bankruptcy (Amendment) Act 2017 states:

Any proceedings, actions or other matters required to be done under the principal Act which are still pending immediately before the coming into operation of this Act shall be continued or concluded under the principal Act as if the principal Act had not been amended by this Act.

18. The above provision means that for the present appeal, the BA should be applied and not the IA.

19. It does not matter that the BN was extended or renewed when the IA came into force. Since the bankruptcy proceeding was commenced under the BA, the same shall govern the bankruptcy proceeding and not the IA.

20. And the JD had on at least two previous appeals to judge in chambers raised this issue on what is the legislation applicable. In both these occasions it were decided that the BA would apply and not the IA.

B. Is there a need to obtain leave first before the JC can proceed against the JD for bankruptcy

21. As indicated by s 60(2) of the Bankruptcy (Amendment) Act 2017 as narrated above, the proceedings must be continued under the principle Act. Hence, it follows that the BA should be applied and not the IA. And under the BA there is no requirement to obtain leave whatsoever before the bankruptcy proceeding could commence against the JD. There is no requirement under the BA that the JC must obtain leave as the JD is a non-social guarantor. That is only a requirement under the IA.

THE ARGUMENTS BEFORE US

[29] As mentioned earlier, the issue is whether the JC ought to have obtained leave of the insolvency court under s 5(3)(b) of the IA 1967 and in this regard,

A the JC having to satisfy the insolvency court (s 5(4) of the IA 1967) that the JC has exhausted all modes of execution and enforcement to recover the debts owed by the principal debtor, ie, MASB. It is not in dispute that the JC did not comply with s 5(3)(b) and s 5(4) of the IA 1967. The JC contends that the CP is regulated by the BA 1967 and not the IA 1967.

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[30] It is obvious enough that if the JD is correct in his interpretation of the statutory provisions, then the CP is a nullity as it was initiated or filed in contravention of the IA 1967.

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[31] Counsel for the JD said that in bankruptcy proceedings there are two distinct and separate stages. First, there is the BN stage and thereafter the CP stage. He referred to the Court of Appeal's decision in *Dato' Sri Teong Teck Leng v Jupiter Securities Sdn Bhd* [2004] 1 MLJ 1; [2003] 5 AMR 672; [2003] 4 CLJ 34 (CA), where it was stated that:

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> [29] Before going any further, it is worthwhile to mention that there are two stages in a bankruptcy proceeding, namely, the notice stage and the petition stage.

E **[32]** The parties here have taken diametrically opposite positions on the phrase which appears in s 60 of the Bankruptcy (Amendment) Act 2017, that is, whether there were 'Any proceedings, actions or other matters required to be done under the principal Act which are still pending immediately before the coming into operation of this Act'.

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[33] In this regard, counsel for the JD said that bankruptcy proceedings is commenced *only when the CP is filed*. He relied on a passage from the New Zealand High Court's decision in *In re Rees* [1923] NZLR 779 ('Rees') where Salmond J said,

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> By s 55 it is provided that the bankruptcy of a debtor, if it takes place upon the debtors' own petition, shall, in the absence of relation back to any prior act of bankruptcy, commence at the 'time of filing of the petition'.

H **[34]** Counsel for the JD also referred to the decision of Justice Richardson who sat as the presiding judge of the United Kingdom employment appeal tribunal ('EAT') in *Herry v Dudley Metropolitan Council; Herry v Dudley Metropolitan Council and another* [2017] ICR 610; UKEAT/0100/16 ('Herry') where the judge referred to ss 267 and 268 of the Insolvency Act 1986 (United

I Kingdom) and said:

> [16] The service of a statutory demand is a precusor to the commencement of bankruptcy proceedings (see ss 267 and 268 of the Insolvency Act 1986. A statutory demand may be served, and bankruptcy proceedings may follow, either on the basis

of a debt which is immediately payable or on the basis of a debt which is not immediately payable where the debtor has no reasonable prospect of paying the debt when it falls due.

[35] Counsel also relied upon the Federal Court's decision in *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302(FC) at [32] where it was stated that the issuance of the BN per r 91 of the Bankruptcy Rules 1969 is more 'administrative' in nature. The Federal Court also emphasized [33] that the BN does not make the guarantor to become a bankrupt and that bankruptcy only occurs when an adjudicating order is made.

[36] The Federal Court observed that there were certain formalities which had to be met before the BN issued by the court. The Federal Court also ruled that there was no requirement for leave to be obtained before the BN is issued. In the opinion of the Federal Court, it would be sufficient if a creditor shows by way affidavit at the hearing of the CP that he has satisfied the requirement of s 5(3) of the IA 1967. The following paragraphs are relevant:

> [25] The issuance of a bankruptcy notice in Form 5 is pursuant to s 3(2) of the Actand r 91 of the Rules 1969. It is pertinent to note that in Forms 4 and 5 of the Rules 1969 a creditor is not required to state that he has complied with the requirement of s 5(3) of the Act. At the same time there is nothing in the Act or the Rules 1969 to say that leave must first be obtained before a bankruptcy notice is issued by the court.
>
> [26] There are certain formalities to be observed when filing the bankruptcy notice. It must be accompanied by a request to the registrar to issue a bankruptcy notice. The bankruptcy notice is dated by the registrar and sealed. There must be an endorsement upon the notice stating that if the debtor has any set-off, counterclaim or cross-demand, he must file an affidavit to that effect.
>
> [27] After those formalities are complied with by the creditor the court is required to issue the bankruptcy notice.
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> ...
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> [34] In our judgment, a reading of s 5(3) of the Act in the context of the purpose identified above would clearly advance the meaning that it would be sufficient compliance with s 5(3) of the Act if a creditor shows by way affidavit at the hearing of the creditor's petition that he has satisfied the requirement of s 5(3) of the Act. The words '*bankruptcy action*' in s 5(3) of the Act has to be read as '*bankruptcy petition*'. Under s 2 of the Act the term 'bankruptcy petition' includes a petition for receiving order.

[37] Counsel for the JD said that the question is not whether the IA 1967 applied to the BN but rather whether the IA 1967 applied to the CP. It was argued that it is upon the filing of the CP that bankruptcy proceedings are deemed to have commenced and that the BN merely 'kickstarts' the process.

[38] Counsel placed considerable emphasis on the fact that the IA 1967 came into force on 6 October 2017 and that as at that date, there was nothing in terms of proceedings, actions or other matters required to be done under the BA 1967 which were still pending immediately before the coming into operation of the IA 1967.

[39] He said that as at 6 October 2017, the status was that the BN had been issued (and had not been served). He said that the BN did not fall within the ambit of the words 'proceedings, actions or other matters' which were immediately pending before the coming into force of the IA 1967. Counsel for the JD also reminded us that bankruptcy proceedings are quasi-criminal in nature and there are penal consequences.

[40] Hence, there must be meticulous compliance with the law and the rules thereunder. Also, it was argued that the statue relating to bankruptcy should construed in a manner most favourable to the person affected. Counsel cited the Court of Appeal's decision in *Affin Bank Bhd (previously known as Perwira Affin Bank Bhd) v Abu Bakar bin Ismail* [2018] 2 MLJ 88 (CA), where the Court of Appeal said:

> [18] Since we have decided to affirm the High Court decision, we do not think it is necessary at this stage to deal with this issue. It is well settled that the bankruptcy proceedings are quasi criminal in nature and the strict provision of the law and/or rules must be complied with failing which the orders made in breach are bound to be set aside as of right and that can also be done in collateral proceedings (see *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393). In *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32, Edgar Joseph Jr observed:
>
> > On a concluding note, bearing in mind that bankruptcy proceedings, if successful, would have harsh and penal consequence meticulous compliance with the law is often necessary. The case of *In re North ex-parte Hasluck* is the authority for the proposition that the statue relating to bankruptcy should construed in a manner most favourable to the person affected.

[41] For completeness, it should be mentioned here that on appeal to the Federal Court, the Court of Appeal's decision was reversed. See *Affin Bank Bhd (formerly known as Perwira Affin Bank Bhd) v Abu Bakar bin Ismail* [2020] 2 MLJ 689 (FC).

[42] But it is quite clear that despite the outcome in the Federal Court, the passage from the Court of Appeal's judgment that was relied upon by counsel for the JD, remains good law.

[43] We may now turn to the arguments that were taken on behalf of the JC.

[44] It was argued that the only avenue for the JC to commence bankruptcy proceedings on an unsatisfied and unenforced judgment is s 3(1)(i) of the BA 1967. The said provision deems an act of bankruptcy as having been committed if the JD fails to comply with the BN.

[45] Significantly, it was argued that a BN cannot however be issued unless the JC *invoked the jurisdiction of the bankruptcy court*. Counsel argued that the BN, which must fulfil certain statutory formalities, becomes valid upon it being sealed by the bankruptcy court (see s 3(2) BA 1967 and rr 4, 91(1) and 9 of the Bankruptcy Rules 1969 and Forms 4 and 5 in the Appendix thereto).

[46] Here, the BN issued by the JC against the JD was filed and sealed on 20 September 2017 and therefore, the Bankruptcy Rules 1969 applied to it. It is not disputed that the said BN is governed by the said Rules and the BA 1967.

[47] Counsel said that like a writ, a BN has a validity period within which it must be served, or else its validity must be extended for its service to be proper. Like a writ, if personal service cannot be undertaken, an order for substituted service may be obtained.

[48] He referred to rr 96, 97 and 110 of the Bankruptcy Rules 1969. Thereafter, upon service of the BN on the JD, there arises a seven day statutory period for compliance, failing which an act of bankruptcy will be deemed to have occurred and the JC will have a six month statutory period to file the CP. The CP, if allowed, results in an adjudication order ('AO') and a receiving order ('RO') being made against the JD.

[49] Counsel emphasised that the process from BN to AO and RO is a statutory process arising from one and the same statutory scheme put in place by the Bankruptcy Act 1967. He submitted that:

(a) it would be artificial to divide the said statutory scheme by viewing a BN separately from a CP as the scheme's objective is one and the same, that is, to protect the estate of an insolvent JD (through an AO and RO) for the benefit of bona fide creditors who may otherwise become victims of unsettled debts;

(b) as a JC would not be able to obtain an AO or RO under s 3(1)(i) of the Bankruptcy Act 1967 without an initiating BN, the BN must be taken to form part of the bankruptcy proceedings that result in an AO and RO under that provision;

(c) accordingly, it was submitted that for the purpose of s 60 of the Bankruptcy (Amendment) Act 2017, there were 'pending immediately

before the coming into operation' of the relevant amendments, 'proceedings, actions or other matters' by virtue of the said BN;

(d) the right pursued by a JC through a BN which has not been complied with, namely the right to protect the estate of a defaulting JD through an AO and RO, becomes, after the filing of a CP, housed within the CP;

(e) according to counsel, parliament should be presumed to have intended for the same Act and procedural rules to govern the same right regardless of the stage in which it is being prosecuted;

(f) accordingly, parliament should be presumed to have intended the same Act and procedural rules to apply to the right of a JC to protect the estate of a defaulting JD (through an AO and RO) regardless of whether that right is being prosecuted at the BN stage or CP stage;

(g) according to counsel, such a presumption would be logical because having an amended procedure/scheme govern the prosecution of a right that began being pursued under the preceding procedure/scheme could lead to inconsistencies and contradictions, and such a switch midway through the pursuit of the right should be avoided unless it can be clearly said that Parliament intended for that right to continue being pursued under the amended procedure;

(h) he said that the BN is governed by the Bankruptcy Rules 1969 and the BA 1967. However, the JD's argument is that the Insolvency Rules 2017 (and the IA 1967) apply to the CP;

(i) however, the saving provision within the Insolvency Rules 2017 ought to be given attention as it contains clues as to how the saving provision in the Bankruptcy (Amendment) Act 2017 (s 60) ought to be interpreted;

(j) the saving provision within Insolvency Rules 2017 is r 287(1), and it provides that:

> (1) All proceedings, actions or matters under the revoked Rules which are still pending immediately before the coming into operation of these Rules shall be continued or concluded under the revoked Rules.

(k) the issuance (with seal) of the said BN, its extension and the order permitting its substituted service were initiated and pursued under the Bankruptcy Rules 1969 and it must necessarily follow that the said acts and order amounted to 'proceedings, actions or matters' under the 'revoked Rules'.

[50] Therefore, it was submitted for the JC that:

(a) parliament (who at the same session passed both the amendments to the principal Act and the Insolvency Rules 2017), must be taken to have

addressed its mind coherently to the phrase 'proceedings, actions or matters' that is used in both the IA 1967 and Insolvency Rules 2017;

(b) as the Bankruptcy Rules 1969 deal specifically with, inter alia, the issuance and extension of a BN and its substituted service if warranted, such acts and order must necessarily fall within the phrase 'proceedings, actions or matters' in the saving provision within the 'revoked Rules', namely r 287(1);

(c) accordingly, when the same phrase 'proceedings, actions or matters' appears in s 60(2) of the Bankruptcy (Amendment) Act 2017, it must necessarily carry the same meaning as that evinced in r 287(1) of the Insolvency Rules 2017. In other words, the issuance and extension of a BN and an order for its substituted service must also amount to 'proceedings, actions or matters' within the meaning of s 60(2) of the Bankruptcy (Amendment) Act 2017 just as it does under r 287(1) of the Insolvency Rules 2017; and

(d) therefore, the JC's proceeding on the said BN on the present facts must amount to 'proceedings, actions or matters' that were 'pending immediately before the coming into operation of this (Insolvency) Act' and accordingly, the said BN and proceedings thereon ought to be 'continued or concluded under the principal Act as if the principal Act had not been amended by this (Insolvency) Act'.

[51] Counsel for the JC also advanced the argument that the intention of a saving provision is to narrow the effect of the enactment in which it is found so as to preserve some existing rule or right, as the case may be, from its operation. Counsel referred to the judgment in Edgar Joseph Jr FCJ in *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 (FC) at p 14. Counsel also referred to *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 (FC), at para 29 where it was stated that '... The object of a saving provision is clear enough that is not to interfere with existing rights'.

[52] Therefore, if anything, the ambit of the IA 1967 and the Insolvency Rules 2017 should narrow rather than widen for the purposes of the present facts and accordingly, the IA 1967 and Insolvency Rules 2017 should, yield to the BA 1967 and Bankruptcy Rules 1969.

[53] He said that to put it another way, as the relevant saving provision is contained within the Bankruptcy (Amendment) Act 2017, the operation of that Act and the IA 1967 is narrowed so that the right resulting in a prior BN falls outside the ambit of operation of the amendments and is not interfered with. Accordingly, the continued pursuit of that right should not be affected by the relevant amendments.

[54] Thus, the JC's position is that the BN is not a 'proceeding' 'action' or 'matter' within the meaning of s 60(2) of the Bankruptcy (Amendment) Act 2017 that can be viewed separately from a CP that is subsequently based on a non-compliance of the BN.

[55] According to the JC, the BN and CP are part of the same, continuous process under one statutory scheme designed to confer a JC with a right to protect the estate of an insolvent JD for the benefit of bona fide creditors who may otherwise become victims of unsettled debts. A JC pursues the said right by the issuance of a BN right through to the hearing of the CP. If the CP is allowed, the said right merges into the resulting AO and RO.

[56] The object of the relevant saving provision is not to have that one right governed by different schemes and procedures, but by one and the same scheme and procedure.

[57] According to counsel for the JC, the saving provision in question is, on the contrary, meant to narrow the effect of the amending Act so as to preserve some existing rule or right from its operation; and it is not meant to interfere with existing rights. The other saving provision of relevance, namely r 287(1) of the Insolvency Rules 2017, further supports the JC's submissions.

OUR DECISION

[58] In this case the BN was filed on 20 September 2017 and registered as BC4238. The BN was issued pursuant to r 91 of the Bankruptcy Rules 1969 (now r 89 of the Insolvency Rules 2017) which provides:

> (1) A bankruptcy notice *shall be issued by the Court in which a bankruptcy petition against the debtor may subsequently be filed* [Form 5].

[59] Thus, BC4238 is the bankruptcy case number for the BN and subsequently for the CP as well. Hence, the BN and CP share the same bankruptcy case number.

[60] As mentioned earlier, the JD contends that the BN is merely the product of an administrative act on the part of the court. The JD relied on the passage from the decision of the Federal Court in *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302 at [32] where it was stated that the issuance of the BN per r 91 of the Bankruptcy Rules 1969 is more 'administrative' in nature. The other point that was made is that bankruptcy proceedings involves two stages, that is, the BN stage and the CP stage.

[61] Whilst we accept that bankruptcy proceedings is a two staged process, we do not accept the argument that the BN was issued 'administratively' and therefore merely 'kickstarts' the process. In the case of *Herry* the employment appeal tribunal of the United Kingdom referred to the statutory notice as the 'precursor to the commencement of bankruptcy proceedings'. Counsel for the JD also referred to the case of *Rees*. We have examined both these cases. We do not see how they support the JD's contention that bankruptcy only commences upon the issuance of the CP.

[62] In *Herry*, the EAT was dealing with the issue of the claimant's liability to pay costs in circumstances where the claimant had acted unreasonably in bringing and pursuing the proceedings. The EAT observed [16] that the 'service of a statutory demand is a precursor to the commencement of bankruptcy proceedings ...'. The EAT referred to ss 267 and 268 of the Insolvency Act 1986. But those sections do not say that the statutory demand is a precursor to the commencement of bankruptcy proceedings. The question for the EAT was in relation to the effect of bankruptcy on the award of costs that was made against the claimant.

[63] The EAT observed [19] that an award of costs against a bankruptcy in proceedings issued before his bankruptcy is a bankruptcy debt. We fail to see the relevance of *Herry's* case to the problem at hand.

[64] Next, as for the case of *Rees*, the facts which gave rise to the issue was as follows. The debtor had filed a 'debtor's petition'. Section 55 of the Bankruptcy Act 1908, states that the bankruptcy of a debtor shall commence at the time of filing of the petition.

[65] The debtor's petition was filed on 19 December 1922. Section 31 of the Bankruptcy Act 1908 states that the filing of such a petition shall be equivalent to an order adjudicating the debtor a bankrupt. Further, s 80 of the same statute states that a creditor of a debtor shall not retain the benefit of any execution of the goods or lands of the debtor or any debt which has been attached under the process of execution or attachment was completed before the 'date' of the adjudication and before notice of the filing of the bankruptcy petition against the debtor or the commission or any available act of bankruptcy by the debtor.

[66] What happened was that the bankrupt (Rees) was owed some monies by a debtor. One Atkins was a judgment creditor of the bankrupt. A few minutes before the filing of debtor's petition, the debtor of the bankrupt, in obedience to an attachment order made by the magistrate's court on the same day, paid the amount of the attached debt to Atkin, who was a judgment creditor of the bankrupt. The amount so paid was claimed by the official assignee under s 80

of the Bankruptcy Act 1908.

[67] The issue turned on whether the section referred to the 'day' of adjudication or 'time of adjudication'. The court held that the section referred to date (synonymous with day and not time). Thus, the official assignee was entitled to recover the same from Atkin. Again, we are of the view that the case of *Rees* does not assist the JD in any way. There is no provision in the BA 1967 or the IA 1967 which states that bankruptcy proceedings are deemed to have commenced only upon the filing of the CP.

[68] Rather, as was rightly submitted by counsel for the JC, the moment an application is made for the issuance of the BN, the jurisdiction of the bankruptcy court is invoked and the jurisdiction continues until the very end, ie, beyond the AO and RO. The jurisdiction of the bankruptcy court ceases when the AO and RO is set aside or the JD is granted a discharge.

[69] We agree with the submissions that were made by the JC's counsel, that an analogy may be made with the issuance of a writ. A writ is issued by the registry of the court and it is an administrative act. But even so, the fact that a writ has been issued is regarded as the commencement of legal proceedings. Why then should the issuance of the BN be any different? It is important to note that the issuance of the BN was done pursuant to the BA 1967 and the Bankruptcy Rules 1969. There is a statutory process which must be adhered to and the document which is issued has certain features and characteristics which carried with it, legal consequences. Upon the issuance of the writ, time stopped running for purposes of limitation.

[70] And like a writ, the BN has a lifespan. Like a writ, the BN must be served during the period of its validity. Like a writ, a BN may be extended. And upon service of a writ, the defendant must enter appearance or else judgment in default may be entered. Like a writ, upon service of the BN, if the amount stated in the BN is not paid within seven days, then an act of bankruptcy is deemed to have occurred and the JC will have a period of six months to file the CP.

[71] Next, in so far as the two staged process ie, BN followed by CP is concerned, this merely means that there are two steps to be taken. But they are nevertheless steps within a single legal proceeding, namely, as in this case, within BC4238.

[72] It was contended that the CP is a nullity because of non-compliance with s 5(3) of the Insolvency Act 1967. However, the judge took the view that pursuant to s 60 of the Bankruptcy (Amendment) Act 2017, which is a saving provision, the bankruptcy proceeding, which was commenced under the BA

1967, shall continue to be governed by the BA 1967 and not the IA 1967. A

[73] Clearly, prior to 6 October 2017, the JC had a right to commence bankruptcy against the JD and with the ability to file the BN and thereafter, the CP without any necessity for obtaining leave of the insolvency court which entailed proof of having exhausted all modes of execution against the borrower (MASB). In our view, this was a substantive right that had accrued to the JC. Thus, since the JC took the first step under the BA 1967 ie, by the issuance of the BN, the question is — whether the JC's rights under the BA 1967 and the Bankruptcy Rules 1969, have been completely abrogated under the IA 1967, or are they still extant and applicable? B C

[74] In order to address this issue, we found it necessary to refer to the Federal Court case of *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1; [1996] 1 CLJ 529 (FC), ('Lim Phin Khian') where Edgar Joseph Jr FCJ referred to the judgment of Sloan JA in *Dixie v Royal Columbian Hospital* [1941] 2 DLR 138 ('Dixie') and summarised the principles relating to the interpretation of amending statutes. D

[75] He said that unless the language used plainly manifested in express terms or by clear implication a contrary intention: E

(i) a statute divesting vested rights is to be construed as prospective;

(ii) a statute, merely procedural, is to be construed as retrospective; and

(iii) a statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective. F

[76] In the same case, Gopal Sri Ram JCA (as he then was) gave a separate judgment at p 20 (MLJ), where he quoted Suffian LP in *Lee Chow Meng v Public Prosecutor* [1978] 2 MLJ 36 at p 37; [1978] 1 LNS 88, where he said: G

> A statute dealing with procedure has retrospective effect, that is, it applies to proceedings begun before and after the commencement of the statute, unless a contrary intention is expressed or clearly implied. This was so stated by Lord Blackburn in *Gardner v Lucas* (1878) 3 App Cas 582 at p 603: H
>
> > ... it is perfectly settled that if the legislature forms a new procedure, that, instead of proceeding in this form, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be'. I
>
> *On the other hand, a statute dealing with rights has effect only for the future, and is not to be construed retrospectively, it does not apply to proceedings begun before its commencement, it only affects proceedings begun after that, unless there is a clear indication to the contrary*. This was so stated by Jessel MR in *Re Joseph Suche & Co*

Ltd (1875) 1 Ch D 48 at p 50 in the following words:

> It is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. (Emphasis added.)

[77] Thus, having regard to the statutory provisions referred to earlier and the legal principles pertaining to the repeal of statutes, we are of the view that the JC had a vested right to commence bankruptcy proceedings against the JD pursuant to the BA 1967 and the Bankruptcy Rules 1969. To be precise, the JC had a vested or accrued right to apply under the BA 1967 and the Bankruptcy Rules 1969 for the issuance of the BN, and thereafter the CP as well. Those rights were not procedural rights but were substantive rights to commence bankruptcy and which could not be taken away, except by clear statutory words in the amending statute. Indeed, far from being taken away, we are convinced that the JC's rights vis a vis the BN and the CP are preserved as per s 60 of the Bankruptcy (Amendment) Act 2017, and r 287(1) of the Insolvency Rules 2017.

[78] Section 60 of the Bankruptcy (Amendment) Act 2017 provides that:

> 60 Saving
>
> (1) This Act shall not apply to a debtor or a bankrupt against whom a receiving order or adjudication has been made before the coming into operation of this Act.
>
> (2) Any proceedings, actions or other matters required to be done under the principal Act which are still pending immediately before the coming into operation of this Act shall be continued or concluded under the principal Act as if the principal Act had not been amended by this Act.
>
> (3) Notwithstanding subsection (1), subsection 33B(2A) shall apply to a person who has been adjudged bankrupt before the coming into operation of this Act.

[79] And r 287(1) of the Insolvency Rules 2017provides as follows:

> (1) All proceedings, actions or matters under the revoked Rules which are still pending immediately before the coming into operation of these Rules shall be continued or concluded under the revoked Rules.

[80] In our view, the legislation which governed the CP in this case was the BA 1967 and the Bankruptcy Rules 1969. Thus, the issue of obtaining leave of the Insolvency Court under s 5(3) IA 1967 does not arise. Clearly, s 60 of the Bankruptcy (Amendment) Act 2017 holds the key to the present situation. In our view, the interpretation that was advanced on behalf of the JD would violate the purpose or the rationale of saving provisions such as s 60 of the Bankruptcy (Amendment) Act 2017.

[81] The intention of a saving provision is to narrow the effect of the enactment in which it is found to preserve some existing rule or right, as the case may be, from its operation, per Edgar Joseph Jr FCJ in *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 (FC) at p 14. It is also relevant to refer to the Federal Court's decision in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 (FC), [29] where it was stated that '... The object of a saving provision is clear enough that is not to interfere with existing rights'.

[82] Indeed, if we were to accede to the JD's interpretation that the IA 1967 and Insolvency rules 2017 are to apply, then it means that whilst the BN was issued pursuant to the BA 1967 and the Bankruptcy Rules 1969, the CP must however, be governed by the IA 1967 and the Insolvency Rules 2017.

[83] We disagree with the JD's said interpretation. That could not have been the intention of Parliament. In our view, bankruptcy proceedings commenced upon the issuance of the BN, and such proceedings are to be treated as 'pending' for purposes of s 60 of the Bankruptcy (Amendment) Act 2017.

[84] In any event, even if it can be argued that the mere issuance of the BN cannot be equated with 'proceeding', it is our view that s 60 of the Bankruptcy (Amendment) Act 2017 in using the words 'any proceedings, action or *other matters required to be done*' (Emphasis added.) is wide and broad enough to cover the situation that presented itself where the BN was issued when the BA 1967 and Bankruptcy Rules 1969 were in force, whereas the BN was extended and served and the CP was issued/served after the IA 1967 and Insolvency Rules 2017 came into force.

[85] Indeed, it cannot be denied that as at 6 October 2017, at least in so far as the BN was concerned, there were matters which were required to be done. Thereafter, the CP was to be filed. We do not agree that the BN can be viewed separately or in isolation from the CP.

[86] In conclusion, we are impelled to the view that s 60 of the Bankruptcy (Amendment) Act 2017 which is a saving provision, was enacted to preserve vested rights under the BA 1967 and the Bankruptcy Rules 1969 and to preclude the application of the IA 1967 and the Insolvency Rules 2017.

[87] Hence, the bankruptcy proceedings which were initiated by the issuance of the BN (per s 3 of the BA 1967 and the Bankruptcy Rules 1969) is to be continued and concluded pursuant to the BA 1967. In the result, we are not convinced that the judge had misdirected himself in law. We agree with the judge's interpretation of s 60 of the Bankruptcy (Amendment) Act 2017 and its application to the factual matrix that was presented in this case.

[88] Therefore, we find no merits in this appeal and the JD's appeal is hereby dismissed with costs of RM10,000 (subject to allocator).

Appeal dismissed with costs of RM10,000 subject to allocator.

Reported by Dzulqarnain Ab Fatar